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No. 95-984

In the

Supreme Court of the United States

October Term, 1995

State Farm Mutual Automobile Insurance Company,
Petitioner,

v.

State of New Jersey,
Commissioner of Insurance, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

RESPONDENTS' BRIEF AND APPENDIX IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

James J. Ciancia
Acting Attorney General of New Jersey
Attorney for State Respondents
R.J. Hughes Justice Complex
CN 117
Trenton, New Jersey 08625-0117
(609) 292-8567

Joseph L. Yannotti
Assistant Attorney General
Of Counsel
(Counsel of Record)

Michael E. Goldman
Deputy Attorney General
On the Brief

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Is a state, consistent with the Fifth and Fourteenth Amendment to the Constitution, restricted to a particular methodology in determining whether a regulated entity has achieved a constitutionally adequate rate of return.

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No. 95-984

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State Farm Mutual Automobile Insurance Company,
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State of New Jersey,
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On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF AND APPENDIX OF THE RESPONDENT IN OPPOSITION TO PETITION

COUNTERSTATEMENT OF THE CASE

I. INTRODUCTION

Petitioner, State Farm Mutual Automobile Insurance Company ("State Farm") is seeking a writ of certiorari to challenge a determination of the New Jersey Appellate Division in what is essentially a factual and methodological dispute concerning the calculation of the effect of certain state imposed surtaxes and assessments on Petitioner's rate of return for the years 1990 and 1991. As will be shown below, this case presents no important questions of federal or

constitutional law which must be reviewed by this Court, nor does the state appellate ruling below conflict with the relevant decisions of this Court, any United States court of appeals, or any other state court of last resort. Petitioner's claims of such conflict are based upon its consistent mischaracterization of both the factual findings below and the legal principles applied by the state appellate court to those findings.

The case below was both procedurally and factually unique, and involved state insurance surtaxes which are no longer imposed and assessments which will, by their own terms, expire in the near future. Moreover, an analysis of the state appellate ruling below shows that it involved the application of settled principles of law to unique circumstances. Finally, it should be noted that contrary to the importance with which Petitioner seeks to confer upon the ruling which it is asking this Court to review, the opinion below is unpublished and therefore, under the rules governing the Courts of the State of New Jersey, of no precedential value. *R.* 1:36-3 (R.App. 4a)[1].

II. PROCEDURAL AND FACTUAL BACKGROUND

The Fair Automobile Insurance Reform Act ("FAIR Act"), enacted on March 12, 1990 as L. 1990, c. 8, was intended as a comprehensive reform of the statutes and regulations governing private passenger automobile insurance in New Jersey. *N.J.S.A.* 17:33B-2f (P.App. 125a)[2] The principal goals of the Act:

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[1] This notation, "R.App.__," refers to the Appendix to this Brief in Opposition to Petition.

[2] This notation, "P. App.____," refers to the Appendix to the Petition for a Writ of Certiorari.

> . . . were to reduce insurance costs for most New Jersey drivers, to depopulate the JUA[3] by switching insureds to the voluntary market, and to create a funding mechanism to pay off the JUA debt. [*State Farm v. State*, 124 *N.J.* 32, 590 *A.*2d 191, 196 (1991)].

In order to meet the obligations of the JUA, the FAIR Act created the New Jersey Automobile Insurance Guaranty Fund ("Auto Fund") whose funding sources include time-limited surtaxes on automobile insurance premiums and time-limited assessments on all property/casualty premiums written in New Jersey. *N.J.S.A.* 17:33B-49 (P.App. 131a); 17:30A-8(a) (P.App. 136a).

This case flows directly from the State Farm's failure in a prior case to convince the New Jersey Supreme Court that the FAIR Act surtaxes and assessments -- together with the FAIR Act's mandate that those charges not be directly passed on to policyholders, *N.J.S.A.* 17:33B-51 (P. App. 136a); 17:30A-16(b) (P.App. 137a); *State Farm*, 124 *N.J.* at 61, 590 *A.*2d at 206 -- prevented State Farm from having the opportunity to earn a constitutionally adequate rate of return. *State Farm*, 124 *N.J.* at 61-63, 590 *A.*2d at 206, 207. In upholding the constitutionality of the FAIR Act, the New Jersey Supreme Court noted that the Commissioner had promulgated a regulation (*N.J.A.C.* 11:3-16.11, R. App. 1a) that provided insurers with a special rate-relief mechanism in

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3 All New Jersey drivers are required to obtain automobile insurance as a condition of owning and operating an automobile. *N.J.S.A.* 39:6A-1, *et seq.* In 1983, the New Jersey Legislature created the New Jersey Full Insurance Underwriting Association, commonly known as the JUA, to provide coverage, at statutorily set rates, for drivers who were unable to obtain insurance in the voluntary market. See, *N.J.S.A.* 17:30E-1, *et seq.* Although the JUA operated through servicing carriers, all claims and liabilities arising from JUA policies were paid by the JUA. Over time, the JUA operated at a significant deficit, which the FAIR Act was intended to address.

the event that an insurer believed that it had been denied the opportunity to earn a constitutionally adequate rate of return. If, after allowing the Commissioner to consider the insurer's claims and create a record, the insurer still believed it had been denied a fair rate of return, it was free to institute an "as applied" challenge. *Id.* at 63. In brief, the New Jersey Supreme Court concluded that:

> . . . the Legislature's assurance of an adequate rate of return under Section 2g [*N.J.S.A.* 17:33B-2g] and the creation of a special rate-relief process under *N.J.A.C.* 11:3-16.11 demonstrates that the prohibitions [of direct passthroughs] do not necessarily preclude all insurers from earning a fair rate of return. [*Id.* at 61-62].

Thus, the Court rejected the facial challenge to the FAIR Act instituted by State Farm and other insurers in May 1991. It is significant that State Farm entirely ignores the existence of this regulation in its Petition -- the provisions of which it has never directly challenged -- just as during the proceedings below, it ignored the state provided procedure through which it could have appropriately requested rate relief. It is this circumvention of the mechanism provided by *N.J.A.C.* 11:3-16 which led to the unique retrospective proceeding about which State Farm now complains.

Without waiting for the outcome of its constitutional challenge, and notwithstanding the express language of the FAIR Act, State Farm filed with the State's Department of Insurance its intent to impose a surcharge on premiums to recoup surtaxes and assessments. (P.App.70a). A course of correspondence ensued in which the Department requested the information required under its regulation. That information was never fully provided.

Despite the fact that State Farm never provided complete information in response to the Commissioner's data

requirements, the Department transmitted State Farm's surtax and assessment rate-relief requests to the Sate Office of Administrative Law ("OAL") for hearing on June 28, 1991 (P.App.72a).

However, instead of proceeding with the administrative hearing as contemplated by the Department's regulations -- which hearing an Administrative Law Judge ("ALJ") found State Farm had delayed through unjustified refusals to provide the information required by the FAIR Act rate-relief regulation (P. App. 76a) -- State Farm voluntarily withdrew its original rate-relief filing just five weeks before hearings were scheduled to begin, and on May 29, 1992, filed an as-applied challenge in Superior Court, Chancery Division, alleging that the FAIR Act's surtax and assessment provisions deprived it of an opportunity to earn a constitutionally adequate rate of return (*Ibid.*).

In the meantime, State Farm implemented the automatic rate increases[4] allowed under New Jersey laws and regulations totaling 26.3% – 6.1% more than it had requested in its 1990 rate filing. All of these increases were implemented by State Farm later than permitted, and in some cases for a lesser amount than permitted, thereby depriving itself of premiums to which it otherwise would have been entitled.

On June 26, 1992, State Farm filed a motion for partial summary judgment and, on June 29, 1992, the State Defendants filed a motion to dismiss the Complaint. On

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[4] Most of these increases were flex rate increases (*N.J.S.A.* 17:29A-44), under which auto insurers may annually increase premiums without prior approval, in accordance with percentages calculated by the Commissioner of Insurance based in part on published increases in the Consumer Price Index. See, *Matter of Dept. Of Insurance's Order*, 129 *N.J.* 365, 609 *A.*2d 1236 (1992). Increases in premiums for so called "non-standard" insurance coverage were also taken. See *N.J.S.A.* 17:29A-45, *N.J.A.C.* 11:3-19.

August 6, 1992, the trial court denied the motions, and transferred the matter to the OAL with very specific directions to the ALJ to "determine what ... [State Farm's] rate of return was for 1990 and 1991 and what a fair rate of return was for each of those years." (P.App. 119a). If the achieved rate was not fair, the ALJ was directed to "adjust the rate accordingly, for collection in whatever manner he deems reasonable. *Ibid.* This Order created a proceeding different from that which was contemplated by the relevant state regulation, *N.J.A.C.* 11:3-16.11. The Appellate Division later characterized the proceeding conducted in this case as "unprecedented" (P.App. 2a). Since the specific determinations required to be made by the ALJ by the trial court's Order were not the determinations that would have been made under the Department's FAIR Act rate-relief regulations, the ALJ noted:

> . . . that the mandated approach is fundamentally different from the standards contained in *N.J.A.C.* 11:3-6.11 for surtax and assessment filings. [P.App.82a].

The Department promptly transmitted the matter to the OAL. The hearing commenced on August 27, 1992.

After six days of testimony, the ALJ concluded that State Farm had not established a need for rate relief for 1990 and 1991. The ALJ found that for the years in question a return of 13% was the "center of the range of reasonableness for a fair rate of return"[5] (P.App. 91a), and that the lower end of the range of reasonableness, *i.e.*, the minimum required to assure a constitutionally adequate rate of return, was a rate of return in the vicinity of -3.6% to 2.6%. (P.App. 92a). The

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[5] In its Petition, State Farm repeatedly mischaracterizes the ALJ's and the Commissioner's findings in this regard (*e.g.*, Pet. 7): neither the ALJ nor the Commissioner found that a 13% rate of return was the *minimum* constitutionally adequate rate of return, but rather that 13% was a *target* rate of return for the years in question.

ALJ further found that State Farm achieved a rate of return, excluding surtaxes and assessments, of 12.7% and 16.4% for 1990 and 1991 respectively, and a return of 3.4% and 7.5%, respectively, taking surtaxes and assessments into account (P. App. 102a). Thus, since State Farm's achieved rates were above the constitutional minimum, the ALJ properly concluded that State Farm had not been denied a constitutionally adequate rate of return because of FAIR Act surtaxes and assessments.

The Commissioner, in his Final Decision and Order, adopted the ALJ's conclusion that State Farm earned a constitutionally adequate rate of return for the years in question, *i.e.*, 1990 and 1991. (P.App. 44a-67a).

State Farm appealed. On May 12, 1995, the Appellate Division, after a 51 page analysis of all of the issues raised by State Farm -- essentially the same issues raised now in its Petition --correctly found that the conclusions of both the ALJ and the Commissioner, to wit., that State Farm had not been denied the opportunity to earn a constitutionally adequate rate of return, were supported by substantial credible evidence in the record (P.App.32a). The Appellate Division therefore affirmed the Commissioner's Decision and Order. The New Jersey Supreme Court denied State Farm's Petition for Certification on May 31, 1995. (P.App. 43a)

REASONS FOR DENYING THE PETITION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE STATE APPELLATE DIVISION CORRECTLY APPLIED THE PRECEDENTS OF THIS COURT IN FINDING THAT STATE FARM HAD THE OPPORTUNITY TO EARN A CONSTITUTIONALLY ADEQUATE RATE OF RETURN FOR THE YEARS IN QUESTION.

State Farm erroneously attempts in its Petition to create the impression that the ALJ, the New Jersey Insurance Commissioner and the New Jersey Appellate Division did not apply the appropriate legal principles enunciated by this Court to determine whether it was permitted the opportunity to achieve a constitutionally adequate rate of return in 1990 and 1991. To support its claims of error, State Farm has mischaracterized both the factual findings below and the law applicable to those facts, specifically, it has incorrectly asserted that: (1) a "fair rate of return" is defined *only* by the cost of capital (Pet. 7) and (2) the ALJ found that the minimum "fair rate of return" to be 13%, below which State Farm was denied a constitutionally adequate rate of return (Pet.7).

A. THE COST OF CAPITAL IS NOT THE ONLY STANDARD AGAINST WHICH A REGULATED ENTITY'S RETURN MUST BE MEASURED.

Notwithstanding Petitioner's assertion, the Commissioner and the Appellate Division did not "abandon" the principle that a constitutionally adequate rate of return is defined only by the cost of capital, since that never was the only applicable constitutional principle. Rather, this Court has made clear

that the law prescribes no single methodology or formula for determining the constitutional adequacy of rates of a regulated entity. See, *Duquesne Light Co. v. Barasch*, 488 *U.S.* 299, 314 (1989); *FPC v. Hope Natural Gas Co.*, 320 *U.S.* 591, 602 (1944). In determining whether a regulated entity has achieved a constitutionally adequate rate of return, the interests of the consumer must be balanced against the entity's interest in its financial integrity -- including its interest in having a sufficient return to cover its costs of capital. *FPC v. Hope Natural Gas Co, supra,* 320 *U.S.* at 603. Further, rate regulation is not meant to guarantee that the regulated entity produces net revenues for any given year. *Id.*, citing *FPC v. Natural Gas Pipeline Co.*, 315 *U.S.* 575, 590 (1942). Nor does the fact that a particular rate is insufficient to cover the cost of a specific service or good, or a specific line of business, indicate that the rate is confiscatory. *B.&O.R. Co. v. U.S.*, 345 *U.S.* 146, 147-150 (1953).[6]

In fact, a regulated entity has no constitutional right even against a loss. *Market Street R. Co. v. Comm.*, 324 *U.S.* 548, 564 (1945). The courts will defer to the regulator's expertise and methodology in determining what is a constitutionally adequate rate of return, so long as the end result is within a constitutional "zone of reasonableness." *Permian Basin Area Rate Cases*, 390 *U.S.* 747, 767 (1968). The Appellate Division properly applied these principles to the facts adduced at the administrative hearing. See, *e.g.*, (P.App.18a-21a), as did the ALJ (P.App.82a-86a) and the Commissioner (P.App.51a-53a).

There is, moreover, no significance to State Farm's assertion (Pet. at 23-25) that certiorari should be granted to

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[6] The state's FAIR Act rate relief regulation, *N.J.A.C.* 11:3-16 (R.App.6a), which the Petitioner circumvented through its procedural maneuvers, would have afforded an analysis of State Farm's performance, based on all lines of its insurance business for the years in question. As stated previously, State Farm chose not to pursue rate relief under that regulation.

address a "drift" among state courts away from the cost of capital standard. As shown above, it has never been the sole standard against which the adequacy of a regulated entity's return must be measured. Moreover, it is well established that insurance regulation is uniquely a state concern. There need not be total uniformity among state approaches to rate regulation. In fact, Congress passed the McCarran-Ferguson Act, 15 *U.S.C.A.* §§1011-15, to ensure that states would be able to tailor their own individualized methods of regulating insurance companies in their states. See *Lac D'Amiante du Quebec v. American Home Assur.*, 864 *F.*2d 1033, 1039 (3d Cir. 1988), citing *Prudential Insurance Co. v. Benjamin*, 328 *U.S.* 408 (1946) ("Obviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance").

Given Congress' intention that the states act as "laboratories" in this regard, and this Court's well established rule that there is no one constitutionally required method of rate regulation, *Duquesne Light Co. v. Barasch*, *supra*; *F.P.C. v. Hope Natural Gas Co. supra*, it is not surprising that different states have reached different conclusions as to their methodology for rate regulation in their own jurisdictions. This result is not one of constitutional magnitude, was plainly within the contemplation of Congress, and does not require intervention or review by this Court. Sup. Ct. R. 10.1(b), (c).

Thus, what Petitioner has done is to set up a "straw man" cost of capital standard, and then complain that the instant matter constitutes a clear case of a state's abandonment of that standard. In fact, the result in this matter falls clearly within the principles enunciated by this Court and does not conflict with the holdings of any federal Court of Appeals or other state court of last resort. Moreover, contrary to State Farm's position, the record below most certainly does not present this Court with a clear cut legal issue. Petitioner itself makes much of the fact that the administrative agency and the

state appellate court based its conclusions on different aspects of the record -- the ALJ relying on confidence intervals and the appellate court relying on comparable industry returns. Both analyses differ from that proposed by the state's applicable rate relief regulation. Under these circumstances, it can hardly be maintained that this case "starkly" presents this Court with the issue of the appropriate standards to use in determining what is a constitutionally adequate rate of return.

B. THE RECORD BELOW DOES NOT ESTABLISH THAT PETITIONER WAS ENTITLED TO A 13% RATE OF RETURN.

State Farm has also erroneously claimed that it was subject to an unconstitutional taking because its achieved rate of return for 1990 and 1991, 3.4% and 7.5% respectively, fell below the target rate of 13%, and that it should be entitled to rate relief to make up the difference. As the Appellate Division correctly pointed out, Petitioner's argument suffers from two misconceptions, to wit: (1) 13% is not the "fair" rate of return in a retrospective proceeding, and (2) 13% is not the minimally acceptable rate of return. (P.App.24a).

State Farm's entire argument rests on a fundamental misrepresentation of the findings of the ALJ, which were adopted by the Commissioner. The 13% rate of return to which State Farm refers was *not* found to be *the* "fair rate of return" in the context of the retrospective rate-relief hearing, but was rather found to be the "approximation of the center of the range of reasonableness for the fair rate of return" (P.App. 91a). The 13% rate of return was found by the ALJ and the Commissioner to represent what would have been the "expected" or target rate of return in a *prospective* rate hearing -- the rate of return which State Farm should have the *opportunity* to earn. It would not have been a *guarantee* in a prospective rate-relief proceeding. In any given year, an insurer may or may not achieve its *expected* rate of return. So, too, in a retrospective rate-relief proceeding, an insurer

cannot be guaranteed that it will achieve its expected rate of return each year. As the ALJ observed:

> Obviously, an insurer cannot expect to achieve an average return each year considering the volatility and cyclicality of earnings in the insurance industry. Under the circumstances, a range of reasonableness is necessary for a *retrospective* analysis of returns in the industry. [emphasis added, P.App. 92a]

In order to convert a prospective expectation of a 13% return into a retrospective analysis of actual returns, one must determine the range of returns in any one year which would statistically produce the desired target over time. To determine this "range of reasonableness," the Department's expert used the principle of confidence intervals -- a statistical device the Appellate Division recognized as used in many fields (P.App. 30a). Based on these calculations, the low end of the range of reasonableness was found to be from -3.6% to 2.6% (P.App. 92a). Since State Farm's achieved results, even taking surtaxes and assessments into consideration, fall within this range of reasonableness, it has achieved a "fair" -- or constitutionally adequate -- rate of return.

In fact, to adopt Petitioner's position in this case, *i.e.*, that the 13% target rate is the minimum constitutionally adequate rate of return in a retrospective hearing, would produce anomalous results -- results which would change the principle that a regulated entity is entitled to the *opportunity* to earn a constitutionally adequate rate of return to a principle which would *guarantee* a fair rate of return for any past year. If the proceedings below had been a typical "prospective" rate hearing, and 13% had been determined to be a fair rate of return in that hearing, then State Farm's rates would have been set to allow it an *expected* rate of return of 13%. State Farm may or may not have achieved that rate of return in any

given year, but it certainly would not have been *guaranteed* that rate in *every* year.

Similarly, in a retrospective rate hearing, to say that a 13% rate return is "fair" is not to say that State Farm must have earned 13% in *each* of the preceding years in order to earn a constitutionally adequate rate of return. In fact, the methodology adopted in this case was necessary in a retrospective proceeding to make the result equivalent to what the result would have been in a *prospective* hearing. In a prospective hearing the 13% would have been an expected, or "target" return -- not a guarantee. In a retrospective hearing, the 13% becomes an "approximation of the center of a range of reasonableness" (P.App.91a). To adopt Petitioner's reasoning would indeed *create* a different standard between prospective and retrospective rate hearings, a standard where a carrier would be guaranteed a certain rate of return in a retrospective proceeding, but only given the opportunity to earn a fair rate of return in a prospective proceeding.

It is worth pointing out that, contrary to State Farm's assertion, State Farm's *own* figures show that FAIR Act surtaxes and assessments were not "solely responsible" for State Farm's falling below it's expected rate of return. State Farm has agreed that its expected rate of return is 13%. State Farm has further indicated that using its own, preferred methodology, its achieved rate of return, excluding the expense of surtaxes and assessments was -0.1% for 1990 and 9.1% for 1991 (P.App.92a). In other words, even using State' Farm's numbers, its achieved rate of return without the expense of surtaxes and assessments would not have equaled its 13% expected return. Thus, as State Farm's own calculations show, it cannot legitimately claim that its failure to achieve its expected returns was solely due to the State's imposition of non-recoverable surtaxes and assessments. (Pet. at 7,8). It is therefore not entitled to rate relief. Under these circumstances, the result achieved in this matter, *i.e.*, a refusal to grant rate relief to State Farm, is clearly correct,

and should not be disturbed even assuming, arguendo, that there was some infirmity in the methodology used to achieve that result. *Duquesne Light Co. v. Barash, supra,* 488 *U.S.* at 310.

C. THE STANDARDS SET FORTH IN THE FAIR ACT RATE RELIEF REGULATION ARE IRRELEVANT TO THE CASE AT BAR.

The Petitioner is also wrong in its allegations that a purported lack of standards in *N.J.A.C.* 11:3-16.11, the Commissioner's FAIR Act rate-relief regulation, in any way denied it due process with respect to the instant matter (Pet.19-22). In fact, because of Petitioner's procedural machinations, the FAIR Act rate-relief regulation itself had nothing whatever to do with the result achieved in this case.[7] State Farm voluntarily withdrew its original administrative rate relief filing on June 22, 1992. That original filing was proceeding under *N.J.A.C.* 11:3-16.11, and had State Farm permitted that matter to continue to completion, this Court would have had a record upon which to determine whether or not the rate relief regulations sets forth sufficient standards to provide due process to Petitioner.

The matter now before the Court, however, is not an *N.J.A.C.* 11:3-16.11 proceeding, but is an appeal from the Commissioner's affirmance of an administrative determination, the parameters of which were based on very specific standards set forth by the trial court in its August 6, 1992 Order (P.App.113a). That order provided that State Farm's "as-applied" challenge be sent to the administrative agency for a hearing, and that:

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[7] See, *e.g.*, the ALJ's discussion of deviation from *N.J.A.C.* 11:3-16.11 at P. App. 81a, 82a.

> The ALJ assigned should require all *usual* data to be pre-filed, on a expedited basis, and then he should determine what the insurer's rate of return was for 1990 and for 1991 and what a fair rate of return was for each of those years. If the achieved rate was not fair, then he should adjust rates accordingly, for collection in whatever manner he deems reasonable [P.App.119a].

Thus, the administrative proceeding as held pursuant to the order -- and at issue in this case -- was fundamentally different from the type of proceeding contemplated by *N.J.A.C.* 11:3-16.11.

Moreover, it should be noted that within the very limited parameters of the "remand" hearing, State Farm was given every opportunity to present whatever evidence it saw fit to present, and make whatever arguments it saw fit to make. Neither the Department, nor any other party, proposed nor invented "standards" to be applied in the unique hearing forced by State Farm. Expert testimony, in fact, indicated that there was no specific "accepted" methodology. Indeed, expert testimony was presented and considered concerning the appropriate methodology of calculations for determining State Farm's actual results, and whether those results were "fair". In considering State Farm's claims of denial of due process for lack of standards, -- claims identical to those urged upon this Court -- the state appellate court stated that:

> We are satisfied that State Farm received fair treatment and achieved a fair rate of return for 1990 and 1991, notwithstanding the assessments and surtax. State Farm was permitted to present all pertinent data and to urge any methodology it chose upon the agency. No avenue of argument or theory

> was foreclosed. This was an unprecedented hearing. No traditional regulatory guidelines were available calculating an insurer's profitability is a complex process best resolved by the agency entrusted with regulating insurance companies [*State Farm v. State, supra.* (P.App.40a)]

State Farm is complaining now because, even given the total freedom to present its case and argue for what it believed to be the proper methodology and "standards", it was unable to convince either the ALJ, the Commissioner or any of the Judges on the Appellate Division panel that it was denied the opportunity to earn a constitutionally adequate rate of return.

In summary, it is clear that State Farm's petition requests this Court to intervene in a procedurally unique and essentially fact-based rate dispute, with no precedential value, which was properly handled by the state's Insurance Commissioner and the state's courts, in accordance with well established constitutional principles enunciated by this Court in its decisions. The petition should therefore be denied.

CONCLUSION

For all of the reasons stated herein, the petition for a writ of certiorari in this case should be denied.

Respectfully submitted,

James J. Ciancia
Acting Attorney General of New Jersey
Attorney for Respondents,
State of New Jersey, Commissioner of-
Insurance, et al.

By: Michael E. Goldman,
Deputy Attorney General
On the Brief

Joseph L. Yannotti
Assistant Attorney General
Of Counsel
(Counsel of Record)

DATED: February 5, 1996

APPENDIX

PERTINENT STATE REGULATIONS

11:3-16.11 – Rate filings reflecting assessments and surtaxes

(a) All insurers who submit a rate filing which reflects assessments or surtaxes imposed pursuant to N.J.S.A. 17:30A-8(a), and 17:33B-49, respectively shall submit such rate filing independently or any prior approval rate filing submitted pursuant to N.J.A.C. 11:3-16.6.

(b) Any insurer desiring to modify its rates to reflect assessments or surtaxes imposed pursuant to N.J.S.A. 17:30A-8(9) and 17:33B-49, respectively shall provide the following information in support of its application:

1. All of the data required for prior approval filings submitted pursuant to N.J.A.C. 11:3-16.6;

2. A copy of the statutory property and casualty Annual Statement, Exhibit of Premiums and Losses (page 14) for New Jersey for each of the most recent 10 years. The insurer shall also file information combining this data for each of the most recent 10 years for all states and the District of Columbia, if applicable, in which the insurer is authorized to transact business; and shall provide a list of these jurisdictions;

3. The following data for all of its insurance affiliates for each of the most recent 10 years on a Statewide and countrywide basis;

I. For property and casualty affiliates, Exhibit of Premiums and Losses (page 14) of the statutory property and casualty Annual Statement;

ii. For title insurance affiliates, Operations and Investment Exhibit (page 4) and Schedule T - Exhibit of Premiums Written (page 39) of the statutory title insurance Annual Statement;

iii. For life and health affiliates, Liabilities, Surplus and Other Funds (page 3); Analysis of Operations by Lines of Business (page 5); and Exhibit 1 Part 1 and Part 2

(pages 7 and 7A) of the statutory life and health Annual Statement; and

iv. An estimate of the amount of business in other lines that is produced by the synergistic effects of the insurer writing private passenger automobile insurance in this State.

4. Certifications/representations by the insurer's Chief Financial Officer and President containing the information set forth in Exhibit F in the Appendix incorporated herein by reference;

5. A schedule of Key Performance Indicators (KPI's), as set forth in Exhibit G in the Appendix incorporated herein by reference, for the year of the rate filing and each of the preceding two years;

6. For the current year and preceding two years, a schedule of premiums, incurred losses and operating expenses by New Jersey lines of business corresponding to line items one (1) through twenty-two (22) of Part II of the IEE. In addition, provide a schedule of operating expenses by classification corresponding to line items one (1) through twenty-two (22) of Part I of the IEE. The aggregate of expenses reported by line item must agree with the total operating expenses related to New Jersey policies reported by line of business in Part II of the IEE, (sum of lines four (4) through eight (8));

7. For each line item expenditure included in the schedule required pursuant to (b)6 above, the following:

I. A description of all allocation methodologies used to allocate corporate-wide costs (including worldwide, countrywide and regionalwide costs) to New Jersey lines of business;

ii. A description of all allocation methodologies used to allocate operating expenses to New Jersey private passenger automobile liability and physical damage lines of business and to all other New Jersey lines of business;

iii. An explanation for any changes in allocation methodologies between years;

iv. For NJAFIUA/MTF servicing entities which are also insurers, an explanation for differences between allocation methodologies used to prepare the schedule required pursuant to (b)6 above and the methodologies used to prepare Exhibit P of the NJAFIUA/MTF reporting package; and

v. For each operating expense classification by each New Jersey line of business, a schedule which shows the expenses directly charged to a line of business; and indirect expenses allocated to various lines of business using a reasonable allocation methodology;

8. For each New Jersey line of business (including private passenger automobile), the following:

I. The number of named insured;

ii. The number of employees directly dedicated to the line of business;

iii. The square feet of office space dedicated to the line of business (excluding allocations of corporate or administrative office space);

iv. The hours of data processing time charged;

v. The volume of exposures;

vi. The number of policies in force; and

vii. The number of claims reported during each of the three years requested;

9. A report, based on a study and evaluation of the insurer's system of internal accounting control and signed by an independent public accountant. The report shall state that in the accountant's opinion, the system of internal accounting control of the insurer in effect during the current year, taken as a whole, was sufficient to meet the objectives of a system of internal accounting control insofar as those objectives pertain to the prevention or detection of errors or irregularities in amounts that would be material in relation to the insurer's financial statements;

10. A listing of all internal audits performed of the operations of the New Jersey private passenger automobile

lines of business during the current year, including the scope of procedures performed;

11. Copies of all internal audit reports issued during the current year pursuant to (b)10 above and management responses to all internal audit findings, which are deemed to be confidential pursuant to N.J.S.A. 17:23-6;

12. Access to source documents which, in the opinion of the Commissioner, are necessary to support any and all transactions reported on the insurer's statutory annual statement filed with the Department or to support any other schedules referred to herein;

13. An explanation why the insurer believes that the assessment imposed by N.J.S.A. 17:30A-8(9) should be reflected in the requested private passenger automobile rates since the assessment, by statute, is classified as a loan; and

14. Any additional information specifically requested by the Commissioner which may be necessary to evaluate the request for rate relief.

(c) Upon written application and for good cause shown, the Commissioner may, in his or her discretion, waive any of the data filing requirements set forth in (b) above.

(d) The Commissioner shall not approve any increase in an insurer's rates on the basis that the insurer is required to pay assessments pursuant to N.J.S.A. 17:30A-8(9), or surtaxes pursuant to N.J.S.A. 17:33B-49, unless he or she shall find that an increase in revenue is necessary to ensure that the insurer earns a constitutionally adequate return. In making that determination the Commissioner shall consider:

1. The insurer's experience on all lines of its business in New Jersey, and in the case of insurers operating in an insurance holding company system, the experience of all of the lines of business of all affiliated companies in New Jersey, for a period of time over which an insurer could reasonably plan to earn a target rate of return;

2. Whether the insurer and its affiliates, if any, are reasonably efficient in their operations, including claims handling, subrogation and salvage, by comparison to insurers on a statewide and countrywide basis;

3. Whether the insurer and its affiliates, if any, have allocated expenses to New Jersey operations in a fair and equitable manner; and

4. The synergistic effect of mandated private passenger automobile insurance on the sale of other lines of insurance that the filer writes, including, but not limited to, higher premium volumes, lower operating costs and lower acquisition costs.

(e) Each filer shall present in its filing a formula it believes appropriate for determining the return required by relevant constitutional principles, with supporting analysis and data fully explaining why such formula should be utilized.

(f) The Commissioner may determine whether an insurer's rates are, as a result of the payment of the surtaxes and assessments, constitutionally adequate. In the event that the Commissioner determines that rate relief is deemed to be necessary, the Commissioner shall determine whether the rates should be adjusted immediately or over time, as may be appropriate.

PERTINENT NEW JERSEY COURT RULES

1:36-3. Unpublished Opinions: No unpublished opinion shall constitute precedent or be binding upon any court. Except for appellate opinions not approved for publication that have been reported in an authorized administrative law reporter, and except to the extent required by res judicata, collateral estoppel, the single controversy doctrine or any other similar principle of law, no unpublished opinion shall be cited by any court. No unpublished opinion shall be cited to any court by counsel unless all other parties are served with a copy of the opinion and of all other relevant unpublished opinions known to counsel including those adverse to the position of the client.